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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 THONG SOK SOVAN,

10 Plaintiff,

CASE NO. C17-5238-MAT

11 v.

12 NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,

ORDER RE: SOCIAL SECURITY  
DISABILITY APPEAL

13 Defendant.  
14

15 Plaintiff Thong Sok Sovan proceeds through counsel in her appeal of a final decision of  
16 the Commissioner of the Social Security Administration (Commissioner). The Commissioner  
17 denied plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an  
18 Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record  
19 (AR), and all memoranda of record, this matter is REMANDED for further proceedings.

20 **FACTS AND PROCEDURAL HISTORY**

21 Plaintiff was born on XXXX, 1966.<sup>1</sup> She obtained her GED and previously worked as a  
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23 <sup>1</sup> Plaintiff's date of birth is redacted back to the year in accordance with Federal Rule of Civil  
Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files.

1 nurse's aide and gambling dealer. (AR 39, 57.)

2 Plaintiff filed a DIB application in March 2014, alleging disability beginning June 30,  
3 2012. (AR 153-56.) Her application was denied at the initial level and on reconsideration.

4 On September 25, 2015, ALJ Marilyn S. Mauer held a hearing, taking testimony from  
5 plaintiff and a vocational expert (VE). (AR 35-65.) On December 21, 2015, the ALJ issued a  
6 decision finding plaintiff not disabled. (AR 11-30.)

7 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on  
8 February 3, 2017 (AR 1-5), making the ALJ's decision the final decision of the Commissioner.  
9 Plaintiff appealed this final decision of the Commissioner to this Court.

### 10 **JURISDICTION**

11 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

### 12 **DISCUSSION**

13 The Commissioner follows a five-step sequential evaluation process for determining  
14 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
15 be determined whether the claimant is gainfully employed. The ALJ noted plaintiff had been  
16 working fifteen hours a week at an adult care facility from April 2015 forward, but concluded she  
17 had not engaged in substantial gainful activity since the alleged onset date. At step two, it must  
18 be determined whether a claimant suffers from a severe impairment. The ALJ found severe  
19 plaintiff's chronic pain syndrome status post right shoulder SLAP repair and acromioplasty,  
20 symptomatic right sternoclavicular instability, mild osteoarthritis of the right acromioclavicular  
21 joint, headaches, and major depressive disorder, single episode. Step three asks whether a  
22 claimant's impairments meet or equal a listed impairment. The ALJ found plaintiff's impairments  
23 did not meet or equal the criteria of a listed impairment.

1 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess  
2 residual functional capacity (RFC) and determine at step four whether the claimant has  
3 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform  
4 less than the full range of light work, with the following limitations: with the unassisted left arm  
5 and with both arms together, lift twenty pounds occasionally and ten pounds frequently; with the  
6 unassisted right arm, lift ten pounds occasionally and less than ten pounds frequently; sit, stand,  
7 and walk at least six hours in an eight-hour workday for a combined total eight hours; occasionally  
8 reach overhead with right arm; frequently handle, finger, and feel with dominant right hand; no  
9 limitations in use of left hand; never perform forceful pushing or pulling with right arm; never  
10 climb ladders, ropes, or scaffolds and never crawl; frequently balance, stoop, crouch, and kneel;  
11 can perform jobs that allow her to avoid concentrated exposure to vibration and hazards; and  
12 limited to understanding, remembering, and carrying out simple tasks. With that assessment, the  
13 ALJ found plaintiff unable to perform her past relevant work.

14 If a claimant demonstrates an inability to perform past relevant work, or has no past  
15 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant  
16 retains the capacity to make an adjustment to work that exists in significant levels in the national  
17 economy. With the assistance of the VE, the ALJ found plaintiff capable of performing other jobs,  
18 such as work as an office helper, mail clerk, cashier II, counter clerk, and call-out operator.

19 This Court's review of the ALJ's decision is limited to whether the decision is in  
20 accordance with the law and the findings supported by substantial evidence in the record as a  
21 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). *Accord Marsh v. Colvin*, 792 F.3d  
22 1170, 1172 (9th Cir. 2015) ("We will set aside a denial of benefits only if the denial is unsupported  
23 by substantial evidence in the administrative record or is based on legal error.") Substantial

1 evidence means more than a scintilla, but less than a preponderance; it means such relevant  
2 evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v.*  
3 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of  
4 which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
5 F.3d 947, 954 (9th Cir. 2002).

6 Plaintiff argues the ALJ erred in weighing medical source opinions and in assessing her  
7 testimony. She requests remand for further administrative proceedings. The Commissioner argues  
8 any error is harmless, that the ALJ's decision has the support of substantial evidence, and that the  
9 decision should be affirmed.

#### 10 Medical Opinions

11 As plaintiff observes, the ALJ gave great weight to the opinions of non-examining  
12 physician Dr. Olegario Ignacio, examining physicians Drs. Scott Smith and David Rutberg, and  
13 treating orthopedist Dr. Peter Kinahan. Dr. Ignacio opined, in relevant part, that plaintiff could  
14 occasionally lift twenty pounds and frequently lift ten pounds and was limited to occasional  
15 overhead reaching on the right. (AR 86-87.) Drs. Smith and Rutberg opined plaintiff could lift  
16 ten pounds occasionally with her right upper extremity, seldom reach above the shoulder on the  
17 right, could not lift overhead, and could not lift more than ten-to-fifteen pounds. (AR 653.) Dr.  
18 Kinahan concurred with the independent medical examinations (IMEs) of Drs. Smith and Rutberg  
19 and recommended plaintiff be seen by a vocational consultant for consideration of a light job  
20 within the capacity of her right shoulder: "specifically, the right shoulder lifting should not be  
21 more than 10 pounds, reaching no more than occasional and working above shoulder on the right,  
22 no more than seldom." (AR 616.)

23 As described above, the ALJ found plaintiff capable of lifting twenty pounds occasionally

1 and ten pounds frequently with the unassisted left arm and both arms together, ten pounds  
2 occasionally and less than ten pounds frequently with the unassisted right arm, and able to  
3 occasionally reach overhead with her right arm. (AR 16.) Plaintiff avers error in the ALJ's failure  
4 to reconcile the differences between the above-described medical opinions in regard to her ability  
5 to lift, reach overhead, and lift overhead. That is, while purporting to give all of the opinions great  
6 weight, the ALJ did not accommodate the opinions of Drs. Smith and Rutberg limiting plaintiff to  
7 lifting a maximum of fifteen pounds, seldom reaching overhead on the right, and never lifting  
8 overhead, or Dr. Kinahan's concurrence with those opinions. She posits a substantial likelihood  
9 that the additional limitations assessed would result in a further reduction in the number of jobs  
10 identified at step five, and that the VE's testimony lacks evidentiary value in the failure to consider  
11 such limitations. *See Garrison v. Colvin*, 759 F.3d 995, 1011 (9th Cir. 2014) ("The testimony of  
12 a [VE] is valuable only to the extent that it is supported by medical evidence' and has 'no  
13 evidentiary value if the assumptions in the hypothetical are not supported by the record.'") (quoting  
14 *Magallanes*, 881 F.2d at 756). *Accord Lewis v. Apfel*, 236 F.3d 503, 517-18 (9th Cir. 2001).

15 The Commissioner does not dispute that the ALJ failed to reconcile conflicts in the medical  
16 opinions, and that the ALJ erred in neither rejecting, nor adopting the opinions plaintiff could not  
17 lift over fifteen pounds, should seldom reach overhead, and should not lift overhead.<sup>2</sup> *See SSR*  
18 96-8p ("If the RFC assessment conflicts with an opinion from a medical source, the adjudicator  
19 must explain why the opinion was not adopted."). The Commissioner argues any error is harmless

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21 <sup>2</sup> Both plaintiff and the Commissioner point to the fact Dr. Kinahan concurred with the IMEs of  
22 Drs. Smith and Rutberg. It should be noted the RFC is consistent with Dr. Kinahan's separate assessment  
23 of a limitation to lifting ten pounds on the right, and that Dr. Kinahan did not opine as to a lifting limitation  
using both arms together. (AR 16, 616.) However, there appear to be conflicts between the RFC limitation  
to occasional reaching overhead with the right arm and Dr. Kinahan's opinion plaintiff could only seldom  
work above the shoulder, and between Dr. Kinahan's limitation to occasional reaching on the right and the  
absence of any general, non-overhead reaching limitation in the RFC. (*Id.*)

1 in that it is “inconsequential to the ultimate non-disability determination.” *Molina v. Astrue*, 674  
2 F.3d 1104, 1115 (9th Cir. 2012) (quoted and cited sources omitted). The court looks to “the record  
3 as a whole to determine whether the error alters the outcome of the case.” *Id.*

4 The Commissioner first states Dr. Ignacio’s opinion provided substantial evidence in  
5 support of the lifting and reaching limitations in the RFC. The Commissioner, however, makes  
6 this statement without providing any accompanying argument or citation to supportive case law.  
7 Nor does it appear from a review of the ALJ’s decision that this contention has merit. The ALJ  
8 afforded the same amount of weight to the opinions of Drs. Ignacio, Smith, Rutberg, and Kinahan  
9 and, in each instance, found plaintiff more limited than assessed. (AR 23-24 (finding plaintiff’s  
10 postural activities limited beyond that described by Dr. Ignacio; stating, in relation to Drs. Smith,  
11 Rutberg, and Kinahan, that the “record demonstrates ongoing right arm chronic pain and SC joint  
12 indicating” plaintiff is further limited as described in the RFC and that the “longitudinal treatment  
13 record shows ongoing difficulties that limit her further” than those physicians opined).) While  
14 apparent in relation to Dr. Ignacio, it is not clear how the RFC is more restrictive than the  
15 limitations assessed by the other physicians, at least to the extent related to plaintiff’s ability to  
16 lift, reach, and work above shoulder level.

17 The Commissioner next points to the ALJ’s step five finding as rendering the error  
18 harmless. She notes plaintiff discussed, in her opening brief, only one of the five jobs identified  
19 by the VE. (*See* Dkt. 11 at 4-5.) The Commissioner argues that, in ignoring the other four jobs,  
20 plaintiff failed to carry her burden of demonstrating the error resulted in harm. However, the four  
21 light work jobs by definition present a conflict with the insufficiently addressed medical opinion  
22 evidence given the twenty pound lifting requirement. *See* 20 C.F.R. § 404.1567(b) (“Light work  
23 involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects

weighing up to 10 pounds.”)<sup>3</sup>

The Commissioner further argues there is no conflict between the opinions of Drs. Smith, Rutberg, and Kinahan and the requirements of the call-out operator job identified at step five. The sedentary occupation of call-out operator does not involve lifting more than ten pounds at a time and requires only occasional reaching, with no indication in the Dictionary of Occupational Titles (DOT) description indicating the need for more than seldom overhead reaching or any overhead lifting. *See* DOT 237.367-014 (“Compiles credit information, such as status of credit accounts, personal references, and bank accounts to fulfill subscribers’ requests, using telephone. Copies information onto form to update information for credit record on file, or for computer input. Telephones subscriber to relay requested information or submits data obtained for typewritten report to subscriber.”)

Plaintiff responds that, even assuming consistency between the unaddressed limitations and the call-out operator job, there remains a question as to whether there were a significant number of such jobs to support the step five finding. She notes the VE’s testimony of 10,000 call-out operator jobs nationally, without any indication of the number of those jobs regionally. (AR 60.) Plaintiff asserts 500 to 600 jobs within a region is the lowest number found significant. *See Evans v. Colvin*, No. 14-56480, 2017 U.S. App. LEXIS 457 at \*1-2 (9th Cir. Jan. 10, 2017) (“The ALJ’s determination that 600 regional jobs constituted a significant number is supported by caselaw within this and other circuits.”)

The Ninth Circuit Court of Appeals has “never set out a bright-line rule for what constitutes

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<sup>3</sup> Three of the light work jobs identified require frequent reaching, but there is no indication of a need to reach overhead or with both hands. *See* Dictionary of Occupational Titles (DOT) 239.567-010 (office helper), 209.687-026 (mail clerk), and 211.462-010 (cashier II). The VE identified another light work job of counter clerk, but provided a DOT number associated with the job of animal shelter clerk. (*See* AR 29, 60.) The counter clerk job is light work requiring occasional reaching, DOT 249.366-010, while the animal shelter clerk job is sedentary and requires frequent reaching, DOT 249.367-010.

1 a ‘significant number’ of jobs.” *Beltran v. Astrue*, 676 F.3d 1203, 1206 (2012). It has found “a  
2 comparison to other cases . . . instructive.” *Id.* The Ninth Circuit has further made clear that “[t]he  
3 statute in question indicates that the ‘significant number of jobs’ can be *either* regional jobs (the  
4 region where a claimant resides) *or* in several regions of the country (national jobs).” *Id.* (emphasis  
5 in original) (citing 42 U.S.C. § 423(d)(2)(A)). Upon finding “*either* of the two numbers  
6 ‘significant,’” the Court “must uphold the ALJ’s decision.” *Id.*

7 In *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d 519, 529 (9th Cir. 2014), the Ninth Circuit  
8 concluded that, while presenting a “close call[,]” a finding of 25,000 national jobs constituted a  
9 significant number of jobs in several regions of the country. *Cf. Beltran*, 676 F.3d at 1206-07  
10 (1,680 jobs nationally, scattered across several regions, not a significant number). The Ninth  
11 Circuit has never found a number closer to the 10,000 jobs at issue in this case to constitute a  
12 significant number of jobs nationally. *See Lemauga v. Berryhill*, No. 15-56611, 2017 U.S. App.  
13 LEXIS 5735 at \*3 (9th Cir. Apr. 3, 2017) (“The government does not argue before us that the  
14 12,600 available dowel inspector jobs in the national economy represent a significant number. We  
15 note that this court has never found a similar number to be significant.”) (cited cases omitted).  
16 Moreover, while district courts have found similar national numbers sufficient, they have done so  
17 when considered in conjunction with regional numbers. *Sorey v. Berryhill*, No. 16-507, 2017 U.S.  
18 Dist. LEXIS 56335 at \*7-8 (C.D. Cal. Apr. 11, 2017) (citing *Aguilar v. Colvin*, No. 15-2081, 2016  
19 U.S. Dist. LEXIS 88998 \*9-10 (C.D. Cal. July 8, 2016) (11,850 jobs nationally and 1,080 jobs  
20 regionally); *De Rivera v. Colvin*, No. 15-4625, 2016 U.S. Dist. LEXIS 67588 at \*9-10 (C.D. Cal.  
21 May 23, 2016) (5,000 jobs nationally and 500 jobs regionally); *Evans v. Colvin*, No. 13-1500,  
22 2014 U.S. Dist. LEXIS 107921 at \*1-7 (C.D. Cal. Aug. 4, 2014) (6,200 jobs nationally and 600  
23 jobs regionally); *Peck v. Colvin*, No. 12-577, 2013 U.S. Dist. LEXIS 86444 at \*15 (C.D. Cal. June



1 19, 2013) (14,000 jobs nationally and 1,400 jobs regionally); *Hoffman v. Astrue*, No. 09-5252,  
2 2010 U.S. Dist. LEXIS 26207 at \*42-44 (W.D. Wash. Feb. 8, 2010) (9,000 jobs nationally and  
3 150 jobs regionally)).<sup>4</sup> *See also Nelson v. Colvin*, No. 12-cv-05540, 2014 U.S. Dist. LEXIS 15037  
4 at \*7-10 (W.D. Wash. Jan. 14, 2014) (although only 30 jobs statewide identified, 22,000 jobs  
5 nationally was a significant number); *Murphy v. Colvin*, No. C13-0015, 2013 U.S. Dist. LEXIS  
6 136935 at \*38-40 (W.D. Wash. Aug. 22, 2013) (finding significant 364 jobs regionally and 17,782  
7 jobs nationally).

8 Here, with the identification of 10,000 jobs nationally, but no number of those jobs  
9 regionally, the Court declines to find the call-out operator job to constitute a significant number of  
10 jobs to support the step five finding. *See, e.g., Lemauga*, 2017 U.S. App. LEXIS 5735 at \*3. The  
11 error in the ALJ's assessment of the medical opinion evidence cannot be deemed harmless and  
12 necessitates further administrative proceedings.

### 13 Symptom Testimony

14 Absent evidence of malingering, an ALJ must provide specific, clear, and convincing  
15 reasons to reject a claimant's testimony.<sup>5</sup> *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir.  
16 2014) (citing *Molina*, 674 F.3d at 1112). *See also Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th  
17 Cir. 2007). "General findings are insufficient; rather, the ALJ must identify what testimony is not  
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19 <sup>4</sup> In *Gutierrez*, 740 F.3d at 529, the Ninth Circuit noted one other circuit had found fewer than  
20 25,000 national jobs to be significant, pointing to the Eighth Circuit decision in *Johnson v. Chater*, 108  
21 F.3d 178, 180 (8th Cir. 1997), involving the identification of 10,000 jobs nationally. The Eighth Circuit  
case also included the identification of 200 jobs statewide. *See Johnson*, 108 F.3d at 180.

22 <sup>5</sup> In Social Security Ruling (SSR) 16-3p, the Social Security Administration rescinded SSR 96-7p,  
eliminated the term "credibility" from its sub-regulatory policy, clarified that "subjective symptom  
23 follow [its] regulatory language regarding symptom evaluation." SSR 16-3p. However, this change is  
effective March 28, 2016 and not applicable to the December 2015 ALJ decision in this case. The Court,  
moreover, continues to cite to relevant case law utilizing the term credibility.

1 credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821,  
2 834 (9th Cir. 1996). The ALJ may consider a claimant's "reputation for truthfulness,  
3 inconsistencies either in his testimony or between his testimony and his conduct, his daily  
4 activities, his work record, and testimony from physicians and third parties concerning the nature,  
5 severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119  
6 F.3d 789, 792 (9th Cir. 1997).

7 Plaintiff does not demonstrate error in the ALJ's consideration of her symptom testimony.  
8 As argued by the Commissioner, the ALJ provided several specific, clear, and convincing reasons  
9 to reject plaintiff's testimony as to the degree of her limitations, including: (1) evidence of her  
10 failure to take prescription medication despite her testimony the medicine was effective in reducing  
11 her pain and involved no side effects (AR 28), *see Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th  
12 Cir. 2008) (ALJ appropriately considers an unexplained or inadequately explained failure to seek  
13 treatment or follow a prescribed course of treatment); (2) inconsistency with the objective medical  
14 evidence (AR 17-23), *see Carmickle v. Comm'r of SSA*, 533 F.3d 1155, 1161 (9th Cir. 2008)  
15 ("Contradiction with the medical record is a sufficient basis for rejecting the claimant's subjective  
16 testimony."), and *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) ("While subjective pain  
17 testimony cannot be rejected on the sole ground that it is not fully corroborated by objective  
18 medical evidence, the medical evidence is still a relevant factor in determining the severity of the  
19 claimant's pain and its disabling effects."); and (3) inconsistency with plaintiff's activities (AR  
20 28), *see Bray v. Comm'r of SSA*, 554 F.3d 1219 (9th Cir. 2009) (inconsistency between testimony  
21 and daily activities properly considered), and *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007)  
22 (activities may undermine credibility where they (1) contradict the claimant's testimony or (2)  
23 "meet the threshold for transferable work skills[.]").

1 The ALJ need only reconsider plaintiff's symptom testimony to the extent necessitated by  
2 further consideration of the medical opinion evidence. Also, although the Court disagrees with  
3 plaintiff's contention that the ALJ's discussion of inconsistency between her testimony and the  
4 medical evidence of record was not sufficiently specific, the ALJ should take the opportunity on  
5 remand to provide additional detail and/or clarity on this point.

6 **CONCLUSION**

7 For the reasons set forth above, this matter is REMANDED for further administrative  
8 proceedings.

9 DATED this 22nd day of September, 2017.

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12 Mary Alice Theiler  
13 United States Magistrate Judge  
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